IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 5TH JULY 2007 / 14TH ASHADHA 1929

SA.No. 598 of 1994()

AS.127/1990 of DISTRICT COURT, PALAKKAD
OS.36/1986 of SUB COURT, PALAKKAD

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APPELLANT/APPELLANT/PLAINTIFF:

K.P.THOMAS, S/O.PAILY, AGED 52 YEARS, PWD CONTRACTOR, KARAVATTUKUZHIVELIL HOUSE, PANCODE POST, VADUVACODE, ERNAKULAM DISTRICT.

BY ADV. SRI.K.GOPALAKRISHNA KURUP
ADV.P.K.BALAKRISHNAN NAIR

RESPONDENTS/RESPONDENTS/DEFENDANTS:

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1. GOVERNMENT OF KERALA REP. BY THE SECRETARY, WATER AND POWER DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE SUPERINTENDING ENGINEER, SIRUVANI PROJECT CIRCLE, PALAKKAD

3. THE DEPUTY TAHSILDAR (RR), KUNNATHUNADU, PERUMBAVOOR, ERNAKULAM DISTRICT.

BY GOVERNMENT PLEADER LATHA THANKAPPAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 5/7/2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.598 OF 1994

Dated 5th July 2007

J U D G M E N T

Plaintiff in O.S.36 of 1986 on the file of Sub court, Palghat is the appellant. Superintending Engineer and Deputy Tahsildar, Revenue Recovery who are defendants in the suit are the respondents. Appellant instituted the suit seeking a decree for declaration that he is not liable to execute the work and the rearrangement of the work by terminating the agreement and shall not be at his risk and cost and also for a direction to second respondent to refund the security deposit of Rs.20,000/- with interest at 12% from the date of deposit and to restrain respondents from recovering the amount being the alleged loss sustained by the State consequent to the rearrangement of the work. Appellant was the contractor, who submitted the tender which was accepted by second respondent, to execute the work of "Siruvani Project--forming a leading channel to the intake tower with adequate side slope protection".

Under the original of Ext.B2, appellant was requested to attend the office of second respondent on or before 29/12/1982 with required stamp paper and security deposit, to execute the contract. Appellant did not turn up. Ext.B3 communication was then sent directing him to appear and execute the agreement on 17/1/1983. Ext.B1 agreement was later executed on 27/1/1983. Security deposit of Rs.20,000/- was paid. The work site was handed over to the appellant on 9/2/1983. As per the agreement, work has to be completed on or before 8/7/1983. It is admitted case that appellant did not execute the work and consequently second respondent terminated the contract and had to re-arrange the work through another contractor. Before that Ext.B4 notice was issued to the appellant, to show cause why contract shall not be terminated at his risk. Appellant did not send a reply. Earlier to Ext.B4, Ext.A2 letter dated 18/2/1983 was sent by appellant requesting to sanction additional work to enable him to execute the contract. It is on the failure of appellant to execute the work, second respondent terminated the contract as per Ext.B7 proceedings dated 2/4/1983 and re-tendered the work. When respondents took steps to recover Rs.96,821/-,

being the loss sustained due to the failure of appellant to execute the work and consequent rearrangement of the work under the provisions of Revenue Recovery Act, appellant instituted the suit seeking a decree for declaration and injunction. Appellant contended that he could not execute the work not due to his fault, but due to the delay, default and breach of the contract by the department. It was contended that as the water in the channel not lowered he could not execute the work and in such circumstances, contract was broken, not by him, but by respondents and therefore he is not entitled to get back the security amount deposited and is not liable to the loss suffered by the suit. Respondents on the other hand contended that contract was broken by appellant and on account of his failure to execute the work, the work is to be rearranged and as provided under the contract it could only be at the risk and cost of appellant and he is therefore liable to pay the loss and therefore, appellant is not entitled to the decree for declaration or injunction. It was also contended that as appellant is liable to pay the damages caused, he is not entitled to claim back the security amount, which is liable to be

adjusted towards the loss.

2. Learned Sub Judge on the evidence of PW1, DW1, Exts.A1 to A6 and B1 to B8 found that the contract was broken by the appellant and not by respondents. But it was found that the contract was not validly terminated and unless the contract is legally terminated and loss determined, respondents are not liable to realise the damages sought to be recovered through revenue recovery proceedings. Learned Sub Judge held that as the department is entitled to adjust the security deposit towards the loss and appellant is liable for damages caused to the State, appellant is not entitled to get refund the security deposit. Suit was partly decreed.

3. Appellant challenged the decree and judgment before District court, Palakkad in A.S.127 of 1990. Learned District Judge on reappreciation of evidence confirmed the findings of the trial court that appellant committed breach of contract and it was not due to any delay, default or breach of contract by the respondents, the work could not be executed. Learned District Judge found that both parties proceeded on the basis that Ext.B1 contract was terminated and set aside the findings of the trial court that the contract was not

legally terminated. It was also found that evidence establish that under Ext.A6 proceedings the work was rearranged through Paulose, another contractor and total work entrusted to Paulose was for Rs.6,80,822/- and under Ext.B1 the contract given to the appellant was for Rs.5,84,001. Learned District Judge also found that there is no evidence to fix the actual quantum of loss sustained and respondents did not raise a counter claim for realisation of the loss. It was held that appellant is not entitled to claim back the security deposit of Rs.20,000/-. Decree granted by the trial court was set aside and a decree restraining respondents from recovering any amount towards loss consequent to the rearrangement of work, till adjudication by an independent body was granted. That decree and judgment are challenged in this appeal.

4. Second appeal was admitted formulating following substantial questions of law.

> 1) Whether appellant is entitled for a declaration not to rearrange the work at his risk and cost and to get release the security deposit under Section 53 of the Indian Contract Act.

2) Whether appellant is entitled to get damages under Section 53 of the Indian Contract Act as the department had failed to discharge the contractual obligations.

5. Learned counsel appearing for appellant and Government Pleader appearing for respondents were heard.

6. Argument of learned counsel appearing for appellant was that water level of the channel was above 7 feet at the time when the site was handed over to the appellant on 9/3/1983 as proved by the evidence and in such circumstances, work could not have been executed and as respondents did not do anything on their part in spite of Ext.A2 notice findings of courts below that the contract was broken by appellant is unsustainable and being a reciprocal contract, courts below should have found that the agreement was broken by respondents and therefore rearrangement of the work could not be at the risk of appellant and so he is not liable to pay the damages. Learned Government Pleader submitted that courts below appreciated the evidence and entered a factual finding and it cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure and therefore there is no

merit in the appeal.

7. Fact that contract was broken was not in dispute. When the appellant contended that it was broken by respondents as the work is to be executed only after dewatering the work site and department failed to do it to enable appellant to execute the work, respondents contended that contract was broken by the appellant and he did not do anything to execute the work. Trial court appreciated the evidence and entered a factual finding that contract was broken by the appellant. First appellate court reappreciated the evidence and discussed each item of evidence and finally entered a factual finding that the agreement was broken by appellant himself and the breach of contract was not on account of any delay, default or breach by respondents. This concurrent factual finding cannot be interfered by re-appreciating the evidence as sought for by the appellant. As far as factual findings are concerned, finding of the first appellate court is final. It is not for this court to re-appreciate the evidence and substitute the finding by this court to that of courts below. Therefore, it is not open to the appellant now to contend that contract was not broken by him.

8. Then the question is whether appellant is entitled to get a decree for return of security deposit or a decree that he is not liable for the loss sustained by the State on account of rearrangement of the work. As rightly found by courts below, when it is found that contract was broken by the appellant, he is liable to compensate the State for the loss sustained as under the terms of Ext.B1 the rearrangement of the work is at his risk and cost. Appellant is therefore liable to pay the loss as damages.

9. Argument of learned counsel appearing for appellant is that as respondents did not prefer a counter claim in the suit and no evidence was adduced to enable the court to fix the quantum of damages, courts below should not have left open the matter to be decided by an independent body and instead should have found that respondents did not sustain any loss and therefore appellant is entitled to get back the security deposit. On the facts, I cannot agree with the submissions. Under Ext.B1 appellant has to complete the work for a total amount of Rs.5,84,001. Ext.A6 proceedings establish that the work was re-tendered and given to another contractor Paulose for Rs.6,80,822/-. True, evidence establish that

Paulose also did not complete the work and therefore that work was terminated. But Paulose has carried out the work for Rs.6,25,496/- much more than the contract amount under Ext.B1. In such circumstances, courts below rightly found that appellant is not entitled to get back the security deposit and respondents are entitled to realise the damages only on quantifying the loss by an independent body. Hence courts also granted a decree in favour of the appellant restraining respondents from realising the loss consequent to rearrangement of the work before adjudication by an independent body. In such circumstances, I do not find any reason to interfere with the decree granted by first appellate court. In such circumstances, appeal fails and is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.598 OF 1994

5th JULY 2007

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